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Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS,

Petitioner,

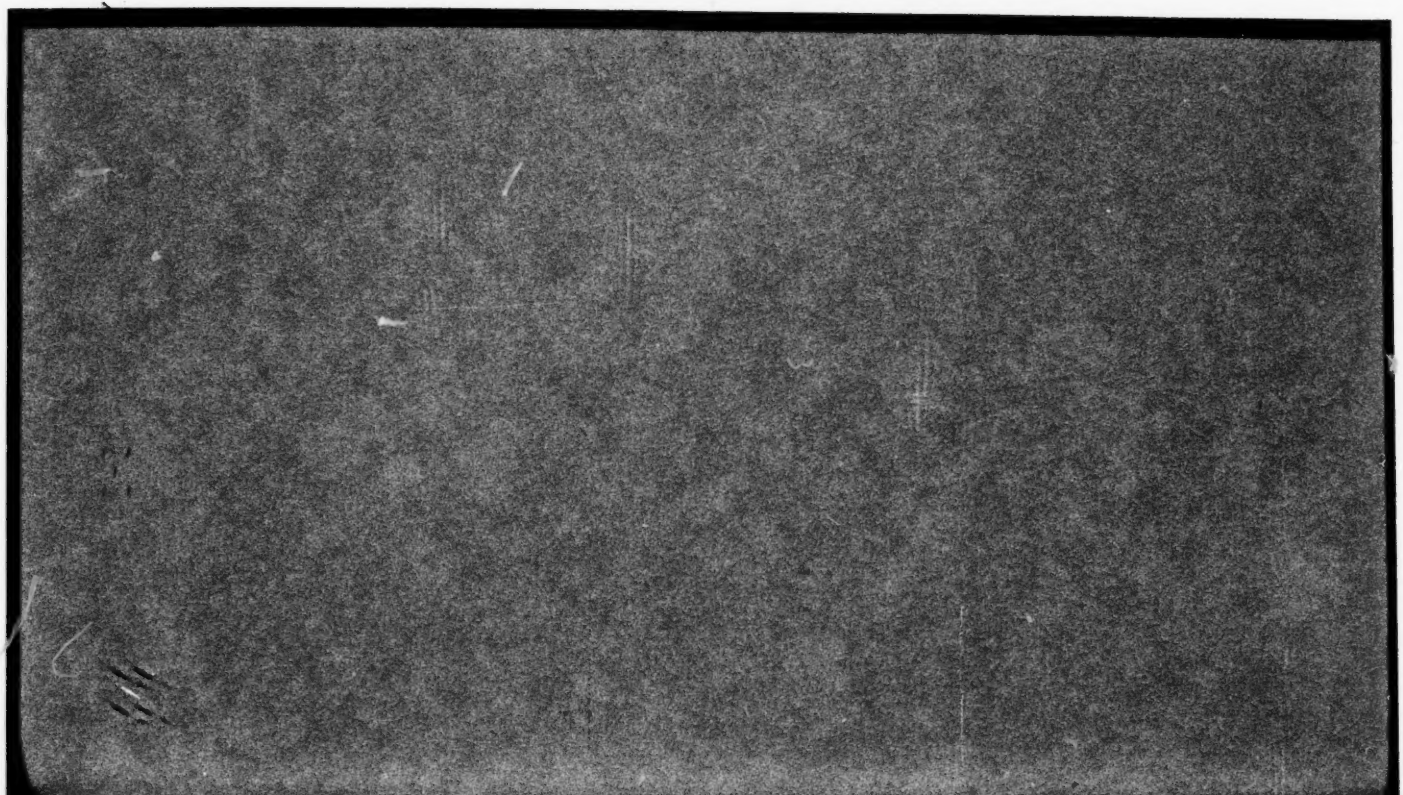
against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY MORSE,
Counsel for Petitioner.



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The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on March 7, 1951.

Opinions Below

The opinion of the District Court (R. 11-16) is reported in 92 F. Supp. 322. The memorandum opinion (R. 17) is unreported. The opinion of the Circuit Court of Appeals (R. 41-46) is reported in 187 F. 2d 610.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 7, 1951 * (R. 46). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1)

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* The time for filing this petition was extended by order of Mr. Justice Robert H. Jackson to August 2, 1951.

Questions Presented

(1) Where the National Service Life Insurance Act makes provision for "* * * extended values * * *" may the Government, after the death of the insured promulgate a regulation which would modify the terms of the insurance contract so as to compel the beneficiary to accept cash in lieu of extended term insurance.

(2) Whether the Administrator may limit the applicability of the nonforfeiture provision as to "* * * extended values * * *" granted by the National Service Life Insurance Act to a specific class of policyholders.

(3) Whether the Government may charge the moneys that veterans had to their credit on deposit in the National Service Life Insurance Fund towards the payment of mortality liabilities from the date of lapse to the date dividends were declared without giving them insurance for their money.

(4) Whether a large class of veterans are bound by regulations that were published in the Federal Register after their death.

Statute Involved

Section 602(f) (38 U. S. C. A. 802(f)) * of the National Service Life Insurance Act states in part:

> "* * * Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator."

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* Appendix pages 10, 11.

Statement

This is a suit on two certificates of level premium National Service Life Inusrance (R. 4). The policies lapsed on March 31, 1947 (R. 7). The complaint (Par. 20, R. 6) states in part " * * * the unearned premiums, reserve and divisible surplus on March 31, 1947, was more than sufficient to pay for insurance on the face amount of the certificate for a period subsequent to the 27th day of August, 1948, * * * ". The insured died on August 27, 1948 (R. 4).

The complaint was dismissed for failure to state a claim upon which relief could be granted by the order of Mr. Justice Robert A. Inch (E. D. N. Y.) (R. 18). The Court below affirmed the orders of the District Court (R. 46).

Specification of Errors to be Urged

(1) In holding that after the death of the insured the Government may modify the terms of an insurance contract without the veteran's consent.

(2) In overlooking that portion of two regulations which provided for extended term insurance.

(3) In overlooking that portion of the National Service Life Insurance Act which made provision for " * * * extended values * * * ".

(4) In affirming the order of the District Court which limited the applicability of the nonforfeiture provision as to " * * * extended values * * * " to a specific class of policyholders.

(5) In holding that the National Service Life Insurance Act did not make provision for lapsed policies.

(6) In affirming the orders of the District Court.

Reasons for Granting the Writ

This decision will affect many dependents of veterans who allowed their policies to lapse and who died before May 28, 1949, the date dividends were declared. Petitioner has been informed that there were numerous actions, and that there are now a number of claims pending in the various states involving the issues in the present case, and believes that widespread litigation will continue until the point is settled by this Court.

In holding that after the death of a veteran the Government may promulgate a regulation as to dividends, when no dividends were declared during the veteran's lifetime, so as to modify the terms of an insurance contract changing it into a banking contract, the Court below has decided a question of importance in Federal law in a manner inconsistent with the decisions of this Court, contrary to the intent of Congress and the Fifth Amendment of the Constitution of the United States.

The Court below referred to four regulations. Petitioner shall now address herself to the regulation of May 28, 1949 (14 F. R. 2832) (38 C. F. R. 1949 Ed. Sec. 8.26a),* promulgated after the death of the foregoing veterans which states in part: " * * * any special dividend * * * shall be paid in cash only * * * ".

The Government having accepted the veteran's premiums for insurance equal to the face value of the policies, and the foregoing veterans having died before dividends were declared, the rights of the parties became fixed and vested. (*Jones* v. *Union Central Life Ins. Co.* 265 App. Div. 388, affd. 290 N. Y. 883; *American National Bank and Trust Co. of Chicago* v. *United States,* C. C. A. 7th, 159 F. 2d, 188). The Government was therefore obligated by contract to give the beneficiaries of the foregoing policies insurance equal to the face value of the policy for such period as the

* Appendix page 11.

cash value of the policy on the date of lapse would purchase.

The Court below then referred to (R. 44, fol. 45) " * * * an earlier regulation, 38 C. F. R. 1949 Ed. Sec. 8.26 * * *".* The Court below overlooked the part which provided:

> "Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 8.29 (a) and 8.30, respectively * * *."

The foregoing regulation was also promulgated after the death of the insured (R. 4) (F. R. September 16, 1948, p. 5399, Vol. 13, No. 181). In holding that the regulations that were published in the Federal Register on September 16, 1948 (R. 44) and May 28, 1949 (R. 44) after the death of the insured were binding on all those veterans who died prior to those dates the Court below has deprived that large class of veterans of vested property rights. The Court below has created a precedent which would allow the Administrator to deprive future veterans and their beneficiaries who may fall within the aforementioned class of vested property rights.

Petitioner argues that the ruling of this Court in the case of *Federal Crop Ins. Corp.* v. *Merrill et al.*, (Oct. 16, 1947) 332 U. S. 380, did not contemplate to bind veterans whose lives were shortened due to service to their country, with regulations that were promulgated in the Federal Register after their death.

Therefore that class of veterans who died before the promulgation of the aforesaid regulation could not give written notice as to what should be done with the dividends that were declared years after their death when they were never apprised during their lifetime that they would be entitled to receive dividends.

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* Appendix pages 11, 12.

The Court below stated in its opinion (R. 44, 45; fol. 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

The Court below in the footnote numbered "2" (R. 44) then referred to regulation " * * * 38 C. F. R., 1947 Supp., Sec. 10.3426 * * * " which appeared in the Fed. Reg. April 1, 1947, Vol. 12, p. 2129,* which also contained a provision as to extended term insurance, and which both the District Court (R. 14) and the Court below overlooked (R. 45), and which provided:

> "Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Sections 10.3429 and 10.3430, respectively. * * * "

As the foregoing two regulations were promulgated before the declaration of any dividends the natural construction would be that the accumulation of undeclared dividends " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * " which is consistent with the allegations of the complaint.

Petitioner respectfully submits that the Court below therefore committed error in overlooking the provisions in the aforesaid regulations which provided: " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * "

As to the regulation 10.3416, cited by the Court below (R. 44), it provided: "If any premium be not paid when

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* Appendix page 12.

due, the National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy."

It has been shown that the National Service Life Insurance Act provided for "extended values" and two of the regulations relied on by the Court below provided for "* * * extended term insurance * * *."

The policy lapsed on March 31, 1947. On November 1, 1947, the following regulation appeared in the Federal Register (Vol. 12, No. 215) at page 7115:*

> "Sec. 10.3105. *Provision for extended term Insurance* After the expiration of the first policy year and upon default in the payment of a premium within the grace period, if a United States Government life insurance policy has not been surrendered for cash or paid up insurance, the policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the insured. * * * The extended term insurance shall be with right to dividends, payable in cash only, * * *."

Petitioner made the foregoing regulation the basis of her motion for reargument (R. 29-31). Petitioner argued both in the District Court and the Court below that as Section 602 (f) of the National Service Life Insurance Act provided for "* * * extended values * * *" and the Administrator, having acted subsequent to the enactment of the National Service Life Insurance Act, was duty bound to act in accordance with the intent of Congress and not limit the nonforfeiture provision as to "* * * extended values * * *" to any specific policyholders.

According to the 1950 annual report of the Administrator of Veterans Affairs at page 87, there are at present 63,208 "five-year level premium term" United States Gov-

* Appendix page 13.

ernment Life Insurance policies. As the foregoing regulation does not limit the applicability to any specific plan these policyholders will have the benefit of extended insurance.

The Administrator's annual report for 1949 at page 74 states that there are 48,370 National Service Life Insurance policies in force as "extended insurance."

Petitioner argues that if the facts warrant it and Section 602 (f) of the National Service Life Insurance Act does not limit the applicability of the provision for "* * * extended values * * *" to any specific plan of insurance, why should the Administrator attempt to deprive one class of veterans of their vested property rights to receive insurance for their money at the date of lapse just because that class of policyholders have policies of a different name?

Section 605 (a) (38 U. S. C. A. Sec. 805(a)) * of the Act states in part:

> "* * * All premiums paid * * * shall be deposited * * * to * * * such fund, which * * * shall be available for the payment of liabilities * * *."

Those veterans who allowed their policies to lapse therefore had on deposit to their credit in the National Service Life Insurance Fund on the date of lapse an amount of money proportionate to the premiums they paid towards the creation of the fund. This money therefore remained in the fund from the date of lapse until dividends were declared. These veterans and the beneficiaries of deceased veterans therefore contributed towards the payment of liabilities from the date of lapse until dividends were declared.

Since the regulation of May 28, 1949 (14 F. R. 2832; 38 C. F. R. 1949, Sec. 8.26 a) † which declared the first dividend on National Service Life Insurance, thousands of veterans have allowed their policies to lapse. These veterans and

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* Appendix page 14.

† Appendix page 11.

the beneficiaries of deceased veterans also had money on deposit to their credit in the National Service Life Insurance Fund on the date their policies lapsed. This class of veterans and the beneficiaries of deceased veterans will therefore have to contribute towards the payment of mortality liabilities that were charged to the National Service Life Insurance Fund from the date of lapse until the date the Administrator decides to declare a second dividend, as all mortality liabilities were payable out of the National Service Life Insurance Fund (Sec. 605 (a) of the National Service Life Insurance Act).

This situation will again be created to that class of veterans who will allow their policies to lapse after the declaration of the second dividend. This situation will be created ad infinitum until this Court decides the rights of the veterans who had on deposit to their credit moneys in the National Service Life Insurance Fund on the date their policies lapsed.

The Court below stated (R. 45):

> "* * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. * * *"

This open question will cause endless litigation until this Court finally determines the intent of Congress when they wrote Section 602(f) of the National Service Life Insurance Act and made "* * * Provisions for cash, loan, paid up, and extended values, * * *".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

APPENDIX

Sec. 602(f) (38 U. S. C. A. 802(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided. the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

satisfactory to the Administrator to be totally disabled at the expiration of the level premium term period of his insurance under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provisions for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

Section 8.26(a), Title 38, C. F. R. (Fed. Reg., Vol. 14, p. 2832, published May 28, 1949), provides as follows:

SPECIAL DIVIDENDS—Any special National Service Life Insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends

shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

F. R. April 1, 1947, page 2129, Vol. 12, No. 64

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)

F. R. Nov. 1, 1947, Vol. 12, No. 215, at page 7115

PART 10—INSURANCE

MISCELLANEOUS AMENDMENTS

The following amendments are made to Part 10:

EXTENDED INSURANCE

Sec. 10.3105 PROVISION FOR EXTENDED TERM INSURANCE. After the expiration of the first policy year and upon default in the payment of a premium within the grace period, if a United States Government life insurance policy has not been surrendered for cash or for paid-up insurance, the policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the insured. For this purpose the attained age is the age nearest birthday anniversary as of the effective date of the policy plus the number of years and months from that date to the date the extended term insurance becomes effective. The extended term insurance shall be with right to dividends, payable in cash only, and with right to total permanent disability benefits. The number of monthly installments payable upon due proof of total permanent disability or death of the insured under such extended term insurance will be the same as would then be payable under the policy. The extended term insurance shall not have a loan value, but shall have a cash value. (Secs. 5, 300, 301, 43 Stat. 608, 624, as amended, secs. 1, 2, 46 Stat. 1016; 38 U. S. C. 11, 11a, 426, 511, 512.)

Sec. 605(a) of the National Service Life Insurance Act, 38 U. S. C. A. Sec. 805(a)

Act of Oct. 8, 1940

Sec. 605. (a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

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